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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

GERARDO OTERO, JR.,

Defendant and Appellant.

F066052

(Super. Ct. No. MCR041609)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Madera County. Joseph A. Soldani, Judge.

James F. Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Clara M. Levers, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Cornell, J. and Peña, J.

On August 2, 2011, defendant Gerardo Otero, Jr., dragged his girlfriend out of the house by her hair, punched her in the head and arm, threw down and stepped on her cell phone, and jumped up and down on her car, into which she had just loaded her three children (one of which was defendant's). Defendant pled no contest to dissuading a witness (Pen. Code, § 136.1, subd. (b)(1);¹ a felony) and battery against a spouse (§ 243, subd. (e)(1); a misdemeanor), and he admitted a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). On October 18, 2012, the trial court sentenced him to four years in prison and awarded 19 days of presentence credit, consisting of 13 days of actual credit and six days of conduct credit.

On appeal, defendant contends (1) the trial court violated his equal protection rights by failing to award him more days of credit under the new version of section 4019 and (2) the trial court erred in denying his *Romero*² motion. We will affirm.

DISCUSSION

I. Presentence Credit

On October 1, 2011, a few months after defendant committed the crimes in this case, an amended version of section 4019 became operative. It provides for two days of conduct credit for each two days actually served, or, stated differently, a total of four days of credit for each two days in custody. (§ 4019, subd. (f).) The Legislature specified that the amendment “shall apply prospectively and shall apply to prisoners who are confined ... for a crime committed on or after October 1, 2011.” (§ 4019, subd. (h).) The Legislature also provided in the second sentence of subdivision (h) that “[a]ny days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law.” (*Ibid.*)

¹ All statutory references are to the Penal Code unless otherwise noted.

² *People v. Superior Court (Romero)* (1966) 13 Cal.4th 497 (*Romero*).

The trial court calculated defendant's presentence custody credits using the version of section 4019 that was in effect when he committed the crimes on August 2, 2011. That version provided for two days of conduct credit for every four days actually served, or, stated differently, a total of six days of credit for each four days in custody. (Former § 4019, subd. (f).) On appeal, defendant contends equal protection principles require that the more generous rate of conduct credit accrual under the new version of section 4019 be applied to the days he spent in custody after October 1, 2011.

We addressed this argument in *People v. Ellis* (2012) 207 Cal.App.4th 1546. We said: "In our view, the Legislature's clear intent was to have the enhanced rate apply *only* to those defendants who committed their crimes on or after October 1, 2011. [Citation.] The second sentence does not extend the enhanced rate to any other group, but merely specifies the rate at which all others are to earn conduct credits." (*Id.* at p. 1553.)³

We continue to adhere to *Ellis*, and for the reasons stated there, we reject defendant's contention and conclude he was not entitled to a calculation of credits under the new version of section 4019 for the portion of his time in custody on or after October 1, 2011.

II. Romero Motion

Defendant also contends the trial court abused its discretion under section 1385, subdivision (a) and *Romero* by refusing to dismiss his 2004 strike conviction for actively participating in a criminal street gang (§ 186.22, subd. (a)). He explains that the trial

³ In so holding, we disagreed with *People v. Olague* (2012) 205 Cal.App.4th 1126, review granted August 8, 2012, S203298, which concluded that the second sentence was "meaningless unless the liberalized credit scheme applies to crimes committed before the stated date." (*Id.* at pp. 1131-1132.) On March 20, 2013, the Supreme Court dismissed review and remanded *Olague* in light of *People v. Brown* (2012) 54 Cal.4th 314, which held that there was no retroactive application of an earlier amendment to section 4019.

court erroneously concluded the current conviction was very similar to the prior conviction, which in fact involved property crimes. We find no abuse of discretion.

Section 1385 grants trial courts the discretion to dismiss a prior strike conviction if the dismissal is in furtherance of justice. (§ 1385, subd. (a); *Romero, supra*, 13 Cal.4th at pp. 529-530.) ““A court’s discretion to strike [or vacate] prior felony conviction allegations [or findings] in furtherance of justice is limited. Its exercise must proceed in strict compliance with ... section 1385[, subdivision](a).”” (*People v. Williams* (1998) 17 Cal.4th 148, 158.) The Three Strikes law “was intended to restrict courts’ discretion in sentencing repeat offenders.” (*Romero, supra*, at p. 528; *People v. Garcia* (1999) 20 Cal.4th 490, 501 [“a primary purpose of the Three Strikes law was to restrict judicial discretion”].) The Three Strikes law establishes ““a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike,”” *unless* the sentencing court finds a reason for making an exception to this rule. (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) There are “stringent standards that sentencing courts must follow in order to find such an exception.” (*Ibid.*) In order to dismiss a prior strike conviction, “the court in question must consider whether, in light of the nature and circumstances of [the defendant’s] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams, supra*, at p. 161.)

A trial court’s decision not to dismiss a prior strike conviction is reviewed under the deferential abuse of discretion standard. (*People v. Carmony, supra*, 33 Cal.4th at p. 374.) An abuse of discretion is established by demonstrating that the trial court’s decision is “irrational or arbitrary. It is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions.” (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) When the record shows the trial court considered

relevant factors and acted to achieve legitimate sentencing objectives, the court's decision will not be disturbed on appeal. (*Ibid.*)

In this case, the trial court considered defendant's motion and stated:

"All right. The Court's reviewed both the defense motion and the People's response. And both sides know that in order ... to strike the strike [conviction] the Court has got to find that this offense somehow falls outside the spirit of [the] Three Strikes [law (§§ 667, subds. (b)-(i), 1170.12)]. The Court's having a difficult time doing that inasmuch as he was on parole—recently paroled ... when this offense was committed. It's very similar to his prior offenses, the nature of the offense. He does have—the Court feels is a fairly lengthy record. There's a number of violations of probation, violations of parole. So based upon this, the Court does not believe that ... it's outside the spirit of [the T]hree [S]trikes law."

Defendant urged the court to grant the motion because he had not committed recent crimes, only parole violations, and he had turned his life around and wanted to be able to raise his children. He stated:

"I basically been a habitual criminal. What you stated since I was a kid and I been on probation and parole. And when I got out from this last time I dropped out. I'm no longer a gang member and I was out for almost five years before I caught this case. I changed my life around ... for someone to really complete getting off parole it's the hardest thing you could do. And I changed my life and when I was out here I never had problems with the cops or anything."

The court responded:

"All right. I have taken all of that into consideration When I look at all of the information you just don't fall outside the spirit of Three Strikes. Three Strikes was enacted as a recidivist statute. Folks that are involved in crimes and continue to commit those offenses get longer ... sentences. And, of course, this isn't going to impact the length of your sentence.... But in any event it just does not fall outside the spirit of Three Strikes. I've got to do what the law requires and I believe that's what the law requires."

Defendant now argues that he is outside the spirit of the Three Strikes law because most of his prior convictions were for misdemeanors and his past conduct is devoid of

violence, with the possible exception of the 2004 conviction, which appears to have been nonviolent in nature. He notes there are no facts in the record to show otherwise.

Although the record provides no factual background of the 2004 conviction for actively participating in a criminal street gang (§ 186.22, subd. (a)), it appears to have been connected to property crimes because he was also convicted of vandalism and repeat vandalism (§§ 594, 594.7). But the trial court's erroneous conclusion that the 2004 conviction involved similar conduct to the current offense does not render its decision an abuse of discretion. Defendant's lengthy criminal record—including nine convictions (both misdemeanor and felony) for vandalism, two misdemeanor convictions for resisting an officer, three parole violations, and two probation violations—amply supports a finding that defendant is a recidivist who falls within the spirit of the Three Strikes law. Even if his criminal past was mostly nonviolent, his present crimes were not. And despite his attempts to rise above his criminal past, we certainly cannot say that the trial court's decision was irrational or arbitrary. The court did not abuse its discretion by deciding not to dismiss the prior strike conviction.

DISPOSITION

The judgment is affirmed.